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IN THE

Supreme Court of the United States

Term, 1961

No. 177

DAGNY PLUM,
Petitioner

vs.

TAMPAX, INC.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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IN THE

Supreme Court of the United States

Term, 1961

No.

DAGNY PLUM,
Petitioner

vs.

TAMPAX, INC.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

DAGNY PLUM, Petitioner, prays that a Writ of Certiorari issue to review a decision of the Supreme Court of Pennsylvania, entered in the above-entitled case on January 30, 1961.

CITATION TO OPINION BELOW

The opinion of the Court of Common Pleas of Philadelphia County is unreported. It is printed in the Record (pp. 29-22) and in Appendix "B", hereto, infra p. 14. The opinion of the Supreme Court of Pennsylvania, printed in Appendix B hereto, infra p. 17; is reported in 402 Pa. 616 (1961).

JURISDICTION

The decision of the Supreme Court of Pennsylvania was entered on January 30, 1961 (R. 33). Rehearing was denied on March 28, 1961 (R. 34). The jurisdiction of

this Court is invoked under 28 U.S.C. Section 1257 (3), since a right is claimed under the Constitution of the United States, and under a treaty of the United States.

HOW FEDERAL QUESTION IS PRESENTED

The federal questions sought to be reviewed, pertaining to the rights of a Danish citizen under the Equal Protection Clause of the XIVth Amendment to the Constitution of the United States of America and under the "Treaty of Friendship, Commerce and Navigation Between The United States of America and the Kingdom of Denmark." executed on October 1, 1951, and ratified by the Senate of the United States of America (82nd Congress, 2nd Session), were raised in petitioner's "Answer to Defendant's Petition to Show Cause Why the Complaint Should Not Be Dismissed in Accordance with the Doctrine of Forum Non Conveniens" paragraphs 1(a) (b) (c) (R20-22); and in petitioner's "Petition for Reargument" paragraphs 1(d), 4(a) (R 35-37). These pleadings by petitioner quoted the treaty in question and averred that the petitioner had all the rights and privileges of a resident under the said treaty. The courts below did not refer to these questions in arriving at their decision.

QUESTION PRESENTED

Whether a state court can, under the doctrine of forum non conveniens, dismiss an action commenced by a writ of foreign attachment by a non-resident Danish citizen, where that state has never dismissed similar actions by other non-residents and where there is a treaty between the United States of America and the Kingdom of Denmark which provides, *inter alia* that Danish citizens are to be "accorded national treatment and most favored-nation treatment with respect to access to the courts of justice . . .

within the territories of the other party, in all degrees of jurisdiction . . . in pursuit . . . of their rights."

CONSTITUTIONAL PROVISION, TREATY AND STATUTE INVOLVED

The constitutional provision involved is the XIVth Amendment to the Constitution of the United States of America (Section 1) which states that "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." The Treaty involved is the Treaty of Friendship, Commerce and Navigation Between The United States of America and the Kingdom of Denmark. The statutory provisions involved are the Pennsylvania Act of June 13, 1863, P. L. 568 §44, as amended (12 P.S. 2891) and Rule 1252 of the Pennsylvania Rules of Civil Procedure (12 P.S. Appendix). The pertinent provisions of the Constitution, treaty and statute are printed in Appendix A, infra, pp. 10-13.

STATEMENT

Petitioner is a citizen of Denmark and does not physically reside in Pennsylvania. She instituted this instant action, a Complaint in Equity for an Accounting, by a Writ of Foreign Attachment and attached Pennsylvania garnishees possessing property of the respondent in the amount of approximately $100,000.00. Respondent is a Delaware corporation that solicits business and sends agents and merchandise into Pennsylvania. Its principal place of business is in New York and it is not registered to do business in Pennsylvania.

The respondent is engaged in the business of manufacturing and distributing Tampax, a catamonial device used for feminine hygenic purposes. As a result of petitioner's work, the sale of the said product became lawful in Den-

mark, Norway and Sweden, such sale having been unlawful prior to March 1, 1955. In consideration of this accomplishment and for other reasons not specified, the respondent by written contract obligated itself to give petitioner 25% of the net profits earned after the above date in the conduct of said business in Scandinavia regardless of the form of enterprise. However, in a calculated effort to render hollow and of no value the petitioner's participation in the business and net profits earned in Scandinavia, the respondent entered upon and continued a plan in violation of its contractual duties, to wit, it set up inconsistent and arbitrary reserves so as to reduce net profits; incurred abnormally high advertising costs; caused its Scandinavian corporations to pay its manufacturing subsidiary too high a production price and in other ways failed to exercise a high degree of care, prudence and fidelity required by its fiduciary relationship with the petitioner under the terms of the written contract.

Petitioner sought a decree against the respondent requiring it *inter alia*, to make available at its New York office the books and records of its Scandinavian companies and other requisite agreements (all the records relating thereto are in New York in dependent's possession); to submit an accounting of the profits earned by the Scandinavian companies; to supply petitioner certain balance sheets and profit and loss statements, and establish by appropriate agreements and documents certain interests in the petitioner.

Respondent filed preliminary objections contending that all the relief sought by petitioner concerned the internal affairs of the defendant. The Common Pleas Court of Philadelphia County sustained these preliminary objections. Upon appeal, the Supreme Court of Pennsylvania reversed the Common Pleas Court but on its own motion raised the question of whether the doctrine of forum non conveniens was applicable and remanded the matter back for proceedings in accordance with its opinion. *Plum vs. Tampax, Inc.*, 399 Pa. 552 (1960).

Respondent then entered a general appearance and filed its petition raising the issue of forum non conveniens. Petitioner filed her answer alleging inter alia the treaty in question. The matter was heard on Petition and Answer. The Court of Common Pleas dismissed the Complaint in Equity by making absolute the Rule to Show Cause Why the Complaint should not be dismissed in accordance with the Doctrine of Forum Non Conveniens. Petitioner then appealed to the Supreme Court of Pennsylvania which on January 30, 1961, affirmed the dismissal of the Complaint. On February 8, 1961, petitioner filed a Petition for Reargument. In her Petition for Reargument, petitioner again raised the question of the above-mentioned treaty. On March 28, 1961, the Supreme Court of Pennsylvania, in a per curiam decision, denied the said petition for reargument.

REASONS FOR GRANTING THE WRIT

1. The Supreme Court of Pennsylvania in its decision in the instant case has failed and refused to give effect to the Treaty of Friendship, Commerce and Navigation between the United States of America and the Kingdom of Denmark and has discriminated against the petitioner because she is a "Danish subject and a non-resident of this country" in violation of her rights under the aforementioned treaty and under the equal protection clause of the 14th Amendment to the United States Constitution.

Petitioner instituted her action by a Writ of Foreign Attachment. The Pennsylvania Rules of Civil Procedure (Rule 1252, 12 P.S. Appendix) provide inter alia that:

> "A foreign attachment may be issued to attach property of a defendant not exempt from execution upon any action at law or in equity in which the relief sought includes a judgment or decree for payment of money when
>
> * * * * *

"(3) the defendant is a foreign corporation or similar entity even though registered in the Commonwealth."

The Pennsylvania courts have held that all that is required under the Rules of Civil Procedure and the relevant legislative enactment[1] is that the defendant must be "(1) . . . a non-resident or foreign corporation; and (2) . . . must have real or personal property within this Commonwealth when the Writ of Foreign Attachment was served on the Garnishee." *Falk & Co. vs. So. Texas Cotton Oil Co.*, 368 Pa. 199, 205 (1951).

As early as 1829 in *Milliken v. Aughinbaugh & Clippinger*, 1 P & W 117, 126, the court specifically permitted a non-resident to avail himself of foreign attachment in this State. In the unbroken line of cases, non-resident plaintiffs were permitted to use, without question, foreign attachment against non-resident defendants: where both parties were from New York;[2] the plaintiffs were citizens of Missouri and New York with their business establishments in Canada, where the parties lived at the time, and the defendants were citizens of Scotland and the debt due was contracted in Scotland;[3] where the plaintiff a resident of California, the defendant a Massachusetts corporation, the garnishee a New Hampshire corporation and the contract of insurance issued in California;[4] the plaintiff engaged in business in New York, Paris and London, the defendant United States Ambassador to Germany, and the transaction sued upon occurred in London;[5] the plaintiff a New York firm and the defendant a North Carolina corporation;[6] the plaintiff a New York City attorney and the

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[1] Act of June 13, 1863, P. L. 568, §44 as amended (12 P. S. 2891).

[2] *Chase v. Ninth Natl. Bank of New York*, 56 Pa. 355 (1867).

[3] *Long v. Girdwood*, 150 Pa. 413 (1892).

[4] *Wiener v. American Ins. Co.*, 39 Pa. Super. Ct. 219 (1909).

[5] *Raymond v. Leishman*, 243 Pa. 64 (1914).

[6] *Mindlin v. Sacony S. Co.*, 261 Pa. 354 (1918).

defendant, as it appears, a Canadian corporation without offices in Pennsylvania;[7] and, where the plaintiff a Delaware corporation with its principal place of business in Delaware, the defendant a Maryland corporation with its principal place of business in Maryland, and the contract which was the basis of the suit written and executed in Delaware to be performed there, and neither party registered to do business in Pennsylvania.[8]

However, in the instant case, the Pennsylvania Supreme Court appeared to base its dismissal of the petitioner's Writ of Foreign Attachment on the fact that the plaintiff was a "Danish subject and a non-resident of this country." The Pennsylvania Supreme Court, therefore, has at all times in the past held that non-residents could invoke the Writ of Foreign Attachment in Pennsylvania, but has now held that a non-resident who is a Danish subject cannot. This is an arbitrary discrimination among non-residents and as such is violative of the equal protection clause of the 14th amendment. *Douglas vs. New York, New Haven and Hartford Railroad Co.*, 279 U. S. 377 (1929).

The Pennsylvania Supreme Court appears to justify this arbitrary classification among non-residents under the doctrine of forum non conveniens. However, in the only other case in which forum non conveniens was discussed by the Supreme Court of Pennsylvania[9] the non-resident plaintiff commenced the action in assumpsit against a non-resident dependent by a writ of foreign attachment. All other relevant factors were similar to the case *sub judice*. The defendant raised the issue of forum non conveniens but the court found the doctrine not applicable. The Court, however, has now arbitrarily differentiated between a non-resident who is from Delaware and a non-resident who is from Denmark, although it has refused to invoke forum non conveniens against other non-resident plaintiffs.

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[7] *Atkins v. Canadian SKF Co.*, 353 Pa. 312 (1946).

[8] *Fairchild E. & A. Corp. v. Bellanca Corp.*, 391 Pa. 177 (1960).

[9] *Fairchild E & A Corp. v. Bellanca Corp.*, supra.

2. In 1951 a treaty of Friendship, Commerce and Navigation was entered into between the United States and Denmark. That Treaty provides inter alia that nationals of either party "shall be accorded national treatment and most favored-nation treatment with respect to access to the courts of justice . . . within the territories of the other party, in all degrees of jurisdiction . . . in pursuit . . . of their rights." It defines the term "national treatment" as "treatment accorded within the territories of a party upon terms no less favorable than the treatment accorded therein, in like situation, to nationals . . . of such party." The Pennsylvania Supreme Court has ignored these treaty provisions for it has not accorded your petitioner the same treatment or access to the courts as it has all other non-residents plaintiffs. At the very least, these treaty provisions provide that Danish subjects shall be granted the same rights in the courts of Pennsylvania as other non-residents who are citizens of the United States. It might possible mean and we would strongly urge that it does that the petitioner should be afforded the same rights in the Pennsylvania courts as residents and citizens of Pennsylvania. Your Honorable Court has held that a treaty should be liberally construed to give effect to its purpose and "where a provision of a treaty fairly admits of two constructions" the more liberal interpretation is to be preferred. *Bacardi Corp. of America v. Domenech*, 311 U. S. 150, 156 (1946). Your Honorable Court has also held that state policy must give way to a conflicting treaty. *Clark v. Allen*, 331 U. S. 503 (1947).

3. Clearly the question presented is of importance both domestically and internationally. If the Pennsylvania Supreme Court decision is permitted to stand in the instant case, it will nullify the purpose and intent of the treaty between the government of the United States of America and the Kingdom of Denmark. It will permit the Pennsylvania courts to disregard this treaty and discriminate against citizens of Denmark or any other foreign non-resi-

dent national now protected by a similar treaty in actions commenced by foreign attachment and in all other questions of access to our courts. It will become impossible for a non-resident foreign national to bring an action by foreign attachment and escape the application of the doctrine of forum non conveniens, in any state that considers that doctrine.

This case is also of serious importance because it flies in the face of the Equal protection Clause of the XIVth Amendment. The Pennsylvania Supreme Court's ruling in the instant case has set up distinctions between non-residents of Pennsylvania permitting one group of non-resident plaintiffs access to our courts and refusing access to another group of non-resident plaintiffs who are, in the eyes of the law, similarly situated. The instant decision in the Supreme Court of Pennsylvania may become authority in other jurisdictions as it is now authority in Pennsylvania that the Equal Protection Clause of the XIVth Amendment may be disregarded by the intervention of the doctrine of forum non conveniens, thereby accomplishing what your Honorable Court has said cannot be accomplished by legislative enactment or jurisdiction decision.

CONCLUSION

For the foregoing reasons, this petition for Writ of Certiorari should be granted.

Respectfully submitted

WALLACE D. NEWCOMB, ESQ.
Attorney for Petitioner

APPENDIX "A"

AMENDMENT XIV to the CONSTITUTION OF THE UNITED STATES OF AMERICA U.S.C.A. Const. Amend. 14 §1.

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunity of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION BETWEEN THE UNITED STATES OF AMERICA AND THE KINGDOM OF DENMARK, EXECUTED ON OCTOBER 1, 1951, AND RATIFIED BY THE SENATE OF THE UNITED STATES OF AMERICA IN ITS SECOND SESSION OF THE 82ND CONGRESS.

The pertinent provisions of the said Treaty are as follows:

"ARTICLE V.

"1. Nationals and companies of either Party shall be accorded national treatment and most-favored-nation treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights. It is understood that companies of either Party not engaged in either business or nonprofit activities

within the territories of the other Party shall enjoy such access therein without any requirement of registration or domestication.

"2. Contracts entered into between nationals and companies of either Party and nationals and companies of the other Party, that provide for the settlement by arbitration of controversies, shall not be deemed unenforceable within the territories of such other Party merely on the grounds that the place designated for the arbitration proceedings is outside such territories or that the nationality of one or more of the arbitrators is not that of such other Party. No award duly rendered pursuant to any such contract, and final and enforceable under the laws of the place where rendered, shall be deemed invalid or denied effective means of enforcement within the territories of either Party merely on the grounds that the place where such award was rendered is outside such territories or that the nationality of one or more of the arbitrators is not that of such Party."

* * * * *

"ARTICLE XXII.

"1. The term 'national treatment' means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party.

"2. The term 'most-favored-nation treatment' means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of any third country."

Attached and made part of the said Treaty was the following Protocol:

"Protocol

"At the time of signing the Treaty of Friendship, Commerce and Navigation between the United States of America and the Kingdom of Denmark the undersigned Plenipotentiaries, duly authorized by their respective governments, have further agreed on the following provisions, which shall be considered integral parts of the aforesaid Treaty:

"1. The term 'access' as used in Article V, paragraph 1, comprehends, among other things access to free legal aid and right to exemption from providing security for costs and judgment."

12 PURDON'S PENNSYLVANIA STATUTES ANNOTATED 2891

"A writ of foreign attachment, in the form aforesaid, may be issued in all actions ex contractu, and in actions ex delicto for a tort committed within this Commonwealth, against the real or personal estate of: (a) any person not residing within this Commonwealth, whether or not such person is in the Commonwealth at the time of the issuing thereof, or (b) any corporation incorporated under the laws of any other State or Nation, or (c) any person who being a resident of this Commonwealth shall have removed therefrom after having become liable in an action ex delicto. But in such cases the person having such right of action ex delicto, or some one in his behalf, must, upon oath or affirmation, certify to the truth of the claim and of the facts upon which such attachment is founded, as well as that he verily believes such person has removed to escape service of process to answer for such alleged tort. 1863, June 13, P.L. 568, §44; 1905, March 30, P.L. 76, §1; 1911, June 21, P.L. 1097, §1; 1931, April 24, P.L. 44, No. 36, §1."

THE ABOVE SECTION, INSOFAR AS IT APPLIES TO THE PRACTICE AND PROCEDURE IN FOREIGN ATTACHMENT IS SUSPENDED ABSOLUTELY BY THE FOLLOWING RULE OF CIVIL PROCEDURE.

RULE 1252: 12 PURDON'S PENNSYLVANIA STATUTES, ANNOTATED, APPENDIX.

"A foreign attachment may be issued to attach property of a defendant not exempt from execution, upon any cause of action at law or in equity in which the relief sought includes a judgment or decree for the payment of money when

(1) the defendant is an individual who is a non-resident of the Commonwealth, even though he is present in the Commonwealth;

(2) the defendant is a partnership or an unincorporated association without a regular place of business in the Commonwealth and the action is against the defendant in its firm or association name, even though one or more members of the partnership or association are present in or are residents of the Commonwealth;

(3) the defendant is a foreign corporation or similar entity even though registered in the Commonwealth. Adopted April 12, 1954. Eff. Oct. 1, 1954."

APPENDIX "B"

UNREPORTED OPINION BY COURT OF COMMON PLEAS NO. 1 OF PHILADELPHIA COUNTY

December 15th, 1960

Plaintiff commenced this action by a writ of foreign attachment and thereafter filed a complaint in equity against the defendant for an accounting. Defendant filed preliminary objections in the nature of a petition raising a question of jurisdiction. These preliminary objections were sustained by the court en banc and plaintiff's complaint dismissed. Plaintiff then appealed to your Honorable Court which, on May 4, 1960, in an opinion written by Mr. Justice Cohen, remanded the case to us to proceed in accordance with that opinion. *Plum, Appellant, v. Tampax, Inc.*, 399 Pa. 553 (1960).

The facts of the case are succinctly set forth in your opinion on pages 556, 557 and 558, and we deem it unnecessary to again recite them here.

In remanding this case to us your Honorable Court, after discussing the doctrine of Forum Non Conveniens, instructed us to determine its applicability to the instant case and, on page 563 of your opinion, stated as follows:

> "While, on the face of the record, it would appear that either New York or Denmark might provide an appropriate forum, there is the possibility of a statute of limitations problem and also a question of whether the courts of New York State or Denmark would be willing to hear this case. Proper application of the doctrine of Forum Non Conveniens necessitates that the court below make a finding as to the availability of other forums and then exercise its discretion after considering all the factors."

Pursuant to your instructions we directed defendant to file a petition with rule raising this issue. Defendant filed an answer to the petition. In addition the parties filed of record a stipulation to the effect that the Courts of the State of New York are available to the plaintiff and the bar of the statute of limitations will not take effect until March 15, 1961. The matter was heard before the undersigned and from the enumerated pleadings he determined the following to be the facts anent the applicability of the doctrine of Forum Non Conveniens:

(a) Plaintiff is a Danish subject, and non-resident of this Country.

(b) Defendant is a non-resident foreign corporation, not registered to do business in Pennsylvania, nor does it maintain any office listings or employees or agents in Pennsylvania.

(c) The contract underlying this suit was entered into in Copenhagen, Denmark, and is to be performed entirely within the State of New York.

(d) No element of the performance of the contract has taken place, nor is to take place in the Commonwealth of Pennsylvania.

(e) The contract provides that any disagreement between the parties as to its provisions shall be settled in accordance with the laws of Denmark.

(f) The contract provides that the parties agree that certain Danish courts as enumerated therein shall be fully competent to pass a judgment on any action relating to the agreement.

(g) All of defendant's witnesses would be required to come from jurisdictions other than Pennsylvania.[1]

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[1] Plaintiff avers on information and belief, that all of defendant's witnesses are residents of New York, New York.

(h) Defendant's books and records sought to be examined by the plaintiff are physically outside Pennsylvania.[2]

(i) Plaintiff seeks Pennsylvania process and the equity power of the courts of Pennsylvania to be extended to require certain acts to be done (as more specifically enumerated in said Complaint) outside Pennsylvania.

(j) The plaintiff has the following alternative forums available:

(1) The courts of New York State which are available to foreign non-resident plaintiffs in actions against corporations doing business in New York State with their principal offices therein.

(2) The courts of Denmark which are available to a Danish subject in an action against the foreign parent corporation of a Danish corporation which has agreed to submit to the jurisdiction of certain Danish courts.

(k) The statute of limitations in New York State on actions on contract has not run against the plaintiff.

(l) The statute of limitations on actions on contract in the courts of Denmark has not run against the plaintiff.

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[2] This point, alleged in paragraph 8 of defendant's petition, is seemingly denied by plaintiff in her answer thereto, but is actually admitted in that she avers on information and belief that copies of the books and records may be in Philadelphia. In addition, she previously admitted that defendant does not maintain an office in Pennsylvania.

N.B. The foregoing seems in error. The lower Court has confused financial statements distributed in Pennsylvania by appellee as a public company with the books and records to be examined in this case which are in New York City (9B, 10A—25a).

(m) The Courts of Pennsylvania would be required to apply and resolve questions of either New York or Danish law or both.

In light of these facts it is seen that practically no aspect of this case is in any way concerned with this Commonwealth or with its residents, other than that some of them hold certain monies of defendant. Furthermore, as above noted from the facts, the more convenient courts of New York State are available to the plaintiff, and the statute of limitations of that forum has not run against the plaintiff. Therefore, we can do little more than echo the words of your Honorable Court found on page 562 of your opinion:

> "It appears to us that a Pennsylvania Court would provide a most inappropriate trial forum."

Having found the doctrine of Forum Non Conveniens to be applicable in the instant case, we made defendant's rule absolute and dismissed the complaint.

By the Court:

/s/ GRIFFITHS, J.

IN THE SUPREME COURT OF PENNSYLVANIA
Eastern District

No. 166 January Term, 1961

DAGNY PLUM, *Appellant*,

v.

TAMPAX, INC.

Appeal from the Order of the Court of Common Pleas No. 1 of the County of Philadelphia, at No. 3291, June Term, 1959.

OPINION OF THE COURT

COHEN, *J.* FILED: January 30, 1961.

This is an appeal from an order of the Court of Common Pleas of Philadelphia County which dismissed a complaint in equity by invoking the doctrine of forum non conveniens.

Plaintiff instituted this action by a writ of foreign attachment served upon garnishees possessing property of defendant, a Delaware corporation. Thereupon, defendant filed preliminary objections contending that all of the relief sought related to internal affairs of the defendant corporation. The court below sustained the preliminary objections. On appeal this court reversed the court below but questioned whether the doctrine of forum non conveniens was applicable. We remanded the matter for proceedings in accordance with our opinion. *Plum v. Tampax, Inc.* 399 Pa. 553, 160 A. 2d 549 (1960). Defendant then entered a general appearance and filed a petition and rule upon plaintiff to show cause why the complaint should not be dismissed in accordance with the doctrine of forum non conveniens. Plaintiff filed an answer to this petition and after argument the rule was made absolute and the complaint dismissed. This appeal followed.

While the plaintiff ordinarily controls choice of the forum, a court does not exercise its jurisdiction if the selected forum is a manifestly inappropriate one and if an alternative appropriate forum is available to the plaintiff. Restatement, Conflict of Laws, §117e (Tentative Draft No. 4, April 5, 1957). Whether a suit should be dismissed under the doctrine of forum non conveniens depends largely upon the particular facts and upon the discretion of the trial court. Such exercise of discretion will be overruled on appeal only when abused: *Plum v. Tampax, Inc.*, supra.

The court below, in the proper exercise of its discretion, relied, inter alia, on the following facts as the basis for its decision to refuse jurisdiction.

Plaintiff is a Danish subject and a nonresident of this Country and the defendant is a nonresident foreign corporation, not registered to do business in Pennsylvania and not maintaining any office listings or employees or agents in Pennsylvania. The contract underlying this suit was entered into in Copenhagen, Denmark, and is to be performed entirely within the State of New York. No element of the performance of the contract has taken place, nor is to take place, in the Commonwealth of Pennsylvania. The contract provides that any disagreement between the parties as to its provisions shall be settled in accordance with the laws of Denmark. It also provides that certain Danish courts, enumerated therein, shall be fully competent to pass a judgment on any action relating to the agreement. All of defendant's witnesses would be required to come from jurisdictions other than Pennsylvania. Its books and records sought to be examined by plaintiff are physically outside Pennsylvania.

The following alternative forums are available to the plaintiff: (a) The courts of New York State which are available to foreign nonresident plaintiffs in actions against corporations doing business in New York State with their principal offices therein, or (b) The courts of Denmark which are available to a Danish subject in an action against the foreign parent corporation of a Danish corporation which has agreed to submit to the jurisdiction of certain Danish courts. The statute of limitations in New York State on actions on contract has not run against the plaintiff. In addition, and of great weight, plaintiff seeks to invoke the equity power of the courts of Pennsylvania in order to require certain acts to be done by the defendant outside of Pennsylvania. In light of all of these facts we cannot say that the trial court abused its discretion.

Plaintiff has also contended that the doctrine of forum non conveniens should not be applied in actions instituted by writ of foreign attachment since to do so would destroy the efficacy of that remedy. This contention is unfounded.

A writ of foreign attachment is nothing more than "the equivalent of a summons for the commencement of a personal action." *Raymond v. Leishman*, 243 Pa. 64, 89 Atl. 791 (1914). Upon obtaining jurisdiction over the person of appellee, as occurred in this case, the question of whether the doctrine of forum non conveniens should be applied is the *same as in any other case instituted by summons or by complaint.*

Order affirmed.

LIBRARY
SUPREME COURT, U. S.

JUL 24 1961
JAMES R. BROWNING, Clerk

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October Term, 1961.

No. 177.

DAGNY PLUM,
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v.

TAMPAX, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1961

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

In addition to the opinions noted by the Petitioner (Pet. 14-20), the first opinion of the Supreme Court of Pennsylvania is reported at 399 Pa. 533, 160 A. 2d 549 (1960).

QUESTION PRESENTED.

May the Pennsylvania courts apply their doctrine of forum non conveniens to dismiss the action of a Danish nonresident against a foreign corporation nonresident in Pennsylvania?

STATEMENT.

Petitioner commenced this action against respondent in the Court of Common Pleas No. 1 of Philadelphia County by writ of foreign attachment, naming certain garnishees, and filed a complaint in equity for an accounting. Respondent was not served.

The action was dismissed by the Court of Common Pleas. On appeal it was remanded by the Supreme Court of Pennsylvania to the lower court to determine whether the Pennsylvania doctrine of forum non conveniens applied. On remand, the lower court dismissed the action on the ground of forum non conveniens. The Supreme Court of Pennsylvania affirmed that dismissal as a proper exercise of judicial discretion. Adopting the findings of fact below, the Pennsylvania Supreme Court summarized these findings as follows:

> "Plaintiff is a Danish subject and a nonresident of this Country and the defendant is a nonresident foreign corporation, not registered to do business in Pennsylvania and not maintaining any office listings or employees or agents in Pennsylvania. The contract underlying this suit was entered into in Copenhagen, Denmark, and is to be performed entirely within the State of New York. No element of the performance of the contract has taken place, nor is to take place, in the Commonwealth of Pennsylvania. The contract provides that any disagreement between the parties as to its provisions shall be settled in accordance with the laws of Denmark. It also provides that certain Danish courts, enumerated therein, shall be fully competent to pass a judgment on any action relating to the agreement. All of defendant's witnesses would be required to come from jurisdictions other than Pennsylvania. Its books and records sought to be examined by plaintiff are physically outside Pennsylvania.

"The following alternative forums are available to the plaintiffs: (a) The courts of New York State which are available to foreign nonresident plaintiffs in actions against corporations doing business in New York State with their principal offices therein, or (b) The courts of Denmark which are available to a Danish subject in an action against the foreign parent corporation of a Danish corporation which has agreed to submit to the jurisdiction of certain Danish courts. The statute of limitations in New York State on actions on contract has not run against the plaintiff. In addition, and of great weight, plaintiff seeks to invoke the equity power of the courts of Pennsylvania in order to require certain acts to be done by the defendant outside of Pennsylvania. In light of all of these facts we cannot say that the trial court abused its discretion." *Plum v. Tampax, Inc.*, 402 Pa. 616, 618-19, 168 A. 2d 315, 316-17 (1961).

In her complaint petitioner had alleged the following, inter alia, concerning the underlying controversy:

1. Petitioner entered into a written agreement with respondent on March 15, 1959.

2. In accordance with this agreement, a corporation known as Tampax, Scandinavia A/S ("The Danish Company") was created under the laws of Denmark and 25% of its outstanding and issued stock was transferred to the petitioner.

3. The Danish Company created a wholly-owned subsidiary, Tampax Scandinavia A/B ("The Swedish Company") and a Norwegian Agency ("The Norway Agency").

4. Respondent controls and supervises the operations of these "subsidiaries," determines and approves the purchase and sales price of Tampax, the expenditures and all business activity of these "subsidiaries," and it makes up, supervises and approves their balance sheets and profit and loss statements.

5. Respondent has deprived petitioner of her 25% of the profits of the Scandinavian business by reducing the profit margins of the Danish and Swedish companies.

6. Respondent has not permitted petitioner to examine certain itemized books, records and agreements pertaining to its various companies.

7. The books and records of these Scandinavian corporations and certain other foreign subsidiaries of respondent are kept and maintained by the respondent in its New York office.

On the basis of these allegations petitioner had asked, as relief, that respondent be ordered to:

> (1) make "available at its New York office for examination and inspection" by the petitioner "the books and records which will show all the transactions of:
>
> (a) The Danish company
>
> (b) The Swedish company, and
>
> (c) The Norway Agency"
>
> (2) "Exhibit for inspection and examination" by the petitioner, "through her constituted agents, all agreements and documents in force through the years 1955, 1956, 1957 and 1958 providing for the sale by the respondent and the English company and/or the European company to subsidiary companies distributing tampax in other countries of the world and including therein the transactions with the Danish and Swedish companies;"
>
> (3) "Submit an accounting of the profits earned by the Danish and Swedish companies;"
>
> (4) "Furnish interim balance sheets and profit and loss statements of the Danish and Swedish companies simultaneously with their preparation and delivery" to the respondent; and

(5) "Establish" in the petitioner "by appropriate agreements and documents a 25% share of the Norway Agency."

Respondent had filed Preliminary Objections to the complaint raising questions of jurisdiction. These had been sustained by the Court of Common Pleas No. 1 of Philadelphia on December 28, 1959.

An appeal from this decision had been taken by the petitioner to the Supreme Court of Pennsylvania. On May 4, 1960, that Court, after a careful consideration of the doctrine of forum non conveniens had reversed the decision of the lower court and remanded the case for proceedings in accordance with its opinion, stating:

". . . The sole connection the case has with Pennsylvania is the fact that a debtor of the defendant could be served herein, thus making a foreign attachment possible.

"The witnesses which defendant would be required to have testify in this case are either in New York City, Denmark or other European countries; we can anticipate that it would be costly and inconvenient to have them appear in Pennsylvania. Similar inconveniences may arise if the books and records which apparently form a substantial part of the proposed evidence must be brought here from New York City. Finally, the plaintiff would have us extend our processes and equity power beyond our borders, on the strength of assets reached only by the writ of foreign attachment, to compel an examination of books and records and other relevant documents in New York City and, assuming judgment in the plaintiff's favor, to render a decree giving plaintiff a 25% share of the Norway agency.

"Nevertheless, even though we might feel that a Pennsylvania court is a most inappropriate trial forum, the case must be remanded. The court below, not having the benefit of our present decision, has neither exercised

> any discretion in this matter nor made any determination of whether an alternative forum is available to the plaintiff. While, on the face of the record, it would appear that either New York or Denmark might provide an appropriate forum, there is the possibility of a statute of limitations problem and also a question of whether the courts of New York State or Denmark would be willing to hear this case. Proper application of the doctrine of Forum Non Conveniens necessitates that the court below make a finding as to the availability of other forums and then exercise its discretion after considering all the factors." *Plum v. Tampax, Inc.*, 399 Pa. 553, 562-63, 160 A. 2d 549, 554 (1960).

On November 16, 1960, after further pleadings, argument and the filing of briefs, the complaint had been dismissed by the lower Pennsylvania court on the ground of forum non conveniens.

On appeal, the Supreme Court of Pennsylvania on January 30, 1961 affirmed the dismissal of the Complaint for the reasons stated above at pages 2 and 3. *Plum v. Tampax, Inc.*, 402 Pa. 616, 168 A. 2d 315 (1961). Petitioner's Petition for Reargument was denied, in a *per curiam* decision, without opinion, by the Supreme Court of Pennsylvania on March 28, 1961.

ARGUMENT.

The issue presented here is not, as petitioner suggests, whether she may be excluded from the Pennsylvania courts on the ground that she is a subject and a resident of Denmark. She has not been so excluded. The issue is whether the petitioner, just because she is a Danish subject, must be allowed to bring her suit in any state she chooses—even one that would exclude, under its rule of forum non conveniens, a United States citizen similarly situated if resident in another state.

That petitioner was not excluded from the Pennsylvania courts on the ground that she is a subject and resident of Denmark is obvious from the opinion of the Supreme Court of Pennsylvania in affirming the dismissal of petitioner's suit in Pennsylvania. Considering the petitioner's case with great concern for the protection of her rights, that Court carefully stated its reasons for affirming dismissal, as set forth above at pages 2 and 3.

Petitioner's argument, therefore, would seem to be twofold: (1) the first nonresident litigant excluded from a state's courts on the ground of forum non conveniens has been subjected, simply because he is the first, to discrimination forbidden by the Fourteenth Amendment; (2) even if the doctrine of forum non conveniens had been established in a state for fifty years in cases involving nonresident United States citizens, a treaty granting to a Danish citizen "national treatment . . . with respect to access to the courts of justice within the territories of the other party, in all degrees of jurisdiction . . . in pursuit of their rights" prevents the state court from applying its doctrine of forum non conveniens where a Danish citizen is a plaintiff. Both arguments are completely untenable.

1. Petitioner's first argument is based on the assertion that a writ of foreign attachment may be utilized in Pennsylvania whenever the defendant is a nonresident owning

property within the Commonwealth and that the Pennsylvania Supreme Court "has at all times in the past held that nonresidents could invoke the Writ of Foreign Attachment in Pennsylvania" (Pet. 7). For this proposition she cites several cases where nonresidents have been allowed to avail themselves of this method of starting suit. She cites only one case,[1] however, where the Supreme Court of Pennsylvania discussed the question of forum non conveniens and did not dismiss the suit, but she omits the pertinent fact that the court merely noted that the lower court had not abused its discretion in refusing to apply the doctrine under the facts of that case.

But even if a long line of Pennsylvania Supreme Court cases involving writs of foreign attachment had specifically denied the existence of the doctrine of forum non conveniens in Pennsylvania, petitioner's argument could only be that a state is constitutionally prohibited from applying the doctrine of forum non conveniens for the first time to a nonresident. This is obviously absurd. It is well settled that a state court may decline jurisdiction by applying the doctrine of forum non conveniens,[2] and, as Justice Frankfurter has noted, whether a state decides to accept or reject the doctrine is strictly a matter of state law.[3] It is equally well settled that state courts may overrule their own prior decisions without running afoul of any constitutional guaranties. This is true even where parties may have relied to their detriment on the past decisional law,[4] a reliance which could not be and has not been shown in this case.

In this case, moreover, the Pennsylvania Supreme Court carefully examined (in its first opinion) the doctrine

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1. *Fairchild Engine & Airplane Corp. v. Bellanca Corp.*, 391 Pa. 177, 137 A. 2d 248 (1958).

2. See, e.g., *Williams v. North Carolina*, 317 U. S. 287, 294 (1942) and discussion in *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 504 (1947).

3. *Southern Railway Co. v. Mayfield*, 340 U. S. 1, 4 (1950).

4. See, e.g., *Tidal Oil Co. v. Flanagan*, 263 U. S. 444 (1924); *Brinkerhoff Faris Trust & Savings Co. v. Hill*, 281 U. S. 673 (1930).

of forum non conveniens before setting forth the relevant factors and remanding the case for decision on the basis of these factors, and it carefully reviewed (in its second opinion) the application of the doctrine to this petitioner before deciding that, as a matter of Pennsylvania law, the lower court had not abused its discretion in applying the Pennsylvania doctrine of forum non conveniens in dismissing the suit. In view of the Pennsylvania state courts' findings of fact, it is difficult to conceive of a case in which a state court could more aptly exercise its discretion to apply the doctrine of forum non conveniens, let alone conceive of this case giving rise to a question deserving of review by this Court.

2. Petitioner's second argument is equally untenable. Despite the fact that her controversy is completely lacking in contacts with Pennsylvania, she maintains that the treaty with Denmark prohibits Pennsylvania from applying the doctrine of forum non conveniens to her. Yet the treaty defines "national treatment" as that accorded in like situations to "nationals" of the United States (Pet. 11). It does not say that a Danish citizen's rights are to rise higher with respect to access to Pennsylvania courts than those of citizens of the United States—e.g., California citizens—who are nonresidents of Pennsylvania.

To accept petitioner's position would require reading the treaty to afford a Danish plaintiff the absolute right to bring suit against any defendant in any state where the defendant was owed money and *quasi in rem* jurisdiction was available generally. Thus a Danish plaintiff could disregard states such as New York, which the Pennsylvania court found has contacts with the controversy here and which it found available to the petitioner here, and choose as his forum states like Pennsylvania, California, Alaska or Hawaii, with no contacts at all with the controversy. Precisely this type of argument was made and rejected in *Universal Adjustment Corp. v. Midland Bank*, 281 Mass. 303, 184 N. E. 152 (1933), where the Supreme Judicial Court said:

"The construction of the treaty for which the plaintiff contends would give to Russian corporations who appear in our courts greater rights and privileges than are accorded to other litigants in numerous particulars. (1) It would exonerate them from the rule of forum non conveniens, applicable to all other parties to suits, including individual citizens of Russia. (2) It would give to them greater privileges than are possessed by corporations of sister States of the Union, which always are held subject to that rule." 184 N. E. 152, 163.

CONCLUSION.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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July, 1961.